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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1940

No. 503

GUS FARBER,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

and

BRIEF IN SUPPORT THEREOF.

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No.

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PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

The Petition of Gus Farber respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Two questions are presented by this petition.

The first is, whether a United States Treasury Regulation, governing public conduct on the subject of gold coin operated, by reason of an inconsistency, to repeal an earlier issued regulation.

(For clarity, we shall hereinafter refer to the regulation first promulgated as the First Regulation, and to the regulation thereafter promulgated as the Second Regulation.)

The two regulations conflict with one another in that:

(a) That the doing of one class of acts wilfully or otherwise appears to be wholly legal under the Second Regulation, while under the First Regulation the doing wilfully of any one of said acts constitutes a felony, and

(b) That the doing wilfully or otherwise of an act of another definite kind merely subjects the doer under the Second Regulation to a civil penalty, while, under the First Regulation said act if wilfully done subjects the doer to criminal prosecution for the commission of a felony.

The First Regulation (App. 29) was issued by the President (Executive Order No. 6260, as amended) under the authority of the "Trading With the Enemy Act of 1917" (40 Stat. L. 411), as amended March 9, 1933, 48 Stat. L. 1, 12 U.S.C.A. 95A (App. 12), which Act we shall hereinafter refer to as the First Act.

The Second Regulation, Sec. 20 of the Provisional Regulations, issued on the effective date of and under the Gold Reserve Act of 1934 (App. 33) was issued by the Secretary of the Treasury pursuant to the mandate of Congress, contained in Section 3 of the Gold Reserve Act of 1934, 48 Stat. L. 337 (App. 35),

which Act shall hereinafter be referred to as the Second Act.

Each of said statutes purports to authorize the making of regulations upon the subject of gold coins.

The First Regulation provides in substance that one who acquires gold coins, without a license, has violated the statute unless (a) he is a collector of rare and unusual coins, (b) he has acquired the coins from another such collector, (c) the coins acquired have a recognized special value to collectors of rare and unusual coins. This regulation restates the penalty included in the First Act, of fine not exceeding \$10,000.00 or imprisonment for not to exceed ten years.

The Second Regulation contains no provision requiring that persons dealing in rare and unusual gold coins, without a license, need be collectors of such. The essential requirements being that each coin must possess actual numismatic value.

Petitioner respectfully contends that the decision of the Circuit Court attempts to legislate into the Second Regulation a non-existent proviso to the effect that a license is required if the acquiring be done wilfully and did thereby attempt to avoid an anomalous situation, a situation where two regulations thus in conflict and which thus on the same set of facts permits a choice between severe punishment and mild forfeiture or between severe punishment and no punishment or forfeiture at the mere wish and untrammelled will of a non-judicial field officer of the United States government.

A second question is also presented as to whether the statute upon which the First Regulation was based is unconstitutional on the ground that it grants to the President the power to legislate and is thereby contrary to the provisions of Article I, Paragraph 1, of the Constitution of the United States.

Petitioner was indicted in the Northern District of California. The first count of the indictment (R. 1) charged that on February 21, 1939, petitioner wilfully and unlawfully acquired thirteen \$20 gold coins of the United States without a license therefor. He was convicted upon the first count of the indictment (R. 7). Petitioner when first questioned about the gold coins in question readily admitted that he bought and sold them (R. 79 and 70) and at the trial he testified that the transaction was entered by him upon his books of account (R. 98). He contended at the trial (R. 198-199) and upon his appeal (R. 174 and 198) that even though he admittedly was not a collector of rare and unusual coins he nevertheless had a legal right to do the alleged acquiring without first obtaining a license therefor and that this right was given to him by the permissive features of the Second Regulation.

The trial Court overruled petitioner's demurrer (R. 5), denied his motion in arrest of judgment (R. 167-168) and his motion for a directed verdict (R. 137). The judgment of conviction was entered on September 23, 1939 (R. 7). Petitioner appealed the judgment to the United States Circuit Court of Appeals for the Ninth Circuit, which Court on July 27,

1940 affirmed the judgment of the trial Court (R. 223). Petitioner thereafter, on August 21, 1940, filed a petition for rehearing in said Court which petition was denied September 16, 1940 (R. 224).

B.

REASONS RELIED ON FOR ISSUANCE OF THE WRIT.

1. The decision of the United States Circuit Court of Appeals for the Ninth Circuit in refusing to be bound by or to follow the decision of the United States Supreme Court in the case of *Yuginovich v. U. S.*, 256 U.S. 450, 65 L. Ed. 1043, with reference to the rule to be applied in construing penal statutes, is in conflict with the applicable decisions of the United States Supreme Court.

2. The decision of the United States Circuit Court of Appeals for the Ninth Circuit in holding that the First Regulation is valid and in full force in effect decided two important questions of federal law which have not been, but should be, settled by the United States Supreme Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court for the Ninth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its

docket, "No. 9305, *Gus Farber*, Appellant vs. *United States of America*, Appellee," and that the said judgment of the said Circuit Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Dated, San Francisco, California,
October 11, 1940.

GUS FARBER,

By CHELLIS M. CARPENTER,

Attorney for Petitioner.